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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SANDRA MCMILLION, JESSICA
ADEKOYA, and IGNACIO PEREZ, on
Behalf of Themselves and all Others
Similarly Situated,

Plaintiffs,

v.

RASH CURTIS & ASSOCIATES,

Defendant.

Case No. 4:16-cv-03396-YGR

**PLAINTIFF'S OPPOSITION TO
DEFENDANT RASH CURTIS &
ASSOCIATES' MOTION *IN LIMINE* NO. 1**

Date: April 12, 2019

Time: 9:00 a.m.

Courtroom: 1

Judge: Yvonne Gonzalez Rogers

1 **THE COURT SHOULD NOT VACATE ITS RULE 37 SANCTIONS ORDER STRIKING**
2 **THE EXHIBITS AT ISSUE**

3 On February 2, 2018, the Court struck two exhibits pursuant to Fed. R. Civ. P. 37(c)(1) that
4 Defendant now wishes to use at trial. Order Re: Motions for Summary Judgment, Dkt. No. 168, at
5 12 n. 9 (striking Exhibits 18 and 19). Although Defendant moved for reconsideration of the
6 summary judgment order that struck these documents, Defendant never moved for reconsideration
7 of the Court's Rule 37 sanctions order striking these same documents. *See* Order Denying Motion
8 for Reconsideration, Dkt. No. 199. No new arguments, facts, or evidence have been presented to
9 the Court for why these documents should not have been stricken in the first place. Defendant also
10 offers no explanation why it waited nearly a year to try to "vacate" the Court's summary judgment
11 ruling, and does not attempt to meet the diligence requirement for motions for reconsideration
12 pursuant to Local Rule 7-9(b). Indeed, Defendant did not even seek leave of Court as required by
13 Local Rule 7-9(a) prior to shoehorning its motion for reconsideration into a motion *in limine*.
14 Instead, Defendant has repeatedly cited to the stricken documents in its *Daubert* briefing in
15 violation of the Court's Rule 37 order, and wishes to use the stricken documents at trial.

16 In the Court's Order Granting Plaintiffs' Motion for Class Certification, the Court warned
17 Defendant against sandbagging and delay tactics. *See* ECF Doc. No. 81, at 9 n. 9 ("While the
18 Court does not condone defendant's blatant delaying and sandbagging tactics, for the purposes of
19 judicial efficiency, the Court will consider the additional evidence at this time. Defendant is
20 warned, however, that the use of such tactics in the future may result in evidentiary or monetary
21 sanctions."). Defendant did not heed the Court's warning.

22 Defendant purports that the two documents at issue are an "ECA Advance Trace" report
23 from the account for which Plaintiff Perez received calls and an "Edit Tracking" report from the
24 same account. *See* Def's Br. at 1. Plaintiff repeatedly asked for Defendant to produce these
25 documents since the very beginning of discovery, and even filed motions to compel regarding these
26 documents, only for Defendant to falsely state that they did not exist until discovery was over. For
27 instance, in ruling on Plaintiff's first motion to compel, on April 21, 2017, Judge Corley noted that
28 Plaintiff sought "records related to skip traces Defendant performed to locate Plaintiffs" and

1 “records from other software systems” other than DAKCS (referring to Defendant’s Beyond
2 software). *See* Order Re Discovery Dispute, Dkt. No. 43, at 1-2.

3 On May 1, 2017, Plaintiff emailed a letter memorializing the parties’ in-person meet and
4 confer that occurred on that same date. 1/8/18 Fisher Declaration, Dkt. No. 151-1, Ex. 37. During
5 the meet and confer, Defendant “agreed to review whether any ECA or Accurint files exist
6 concerning any named Plaintiff.” *Id.*, at 1. Defendant also agreed to “discuss with its client
7 whether a production from the Beyond software can be made with regards to any of the named
8 Plaintiffs.” *Id.* “Should Defendant discover any of the above documents, it will produce them on
9 or by May 8, 2017.” In a May 8, 2017 letter, Defendant responded that “No ECA reports were
10 generated for Ms. McMillion or Mr. Perez.” *Id.*, Ex. 38, at 1. Defendant also stated that “there is
11 simply no way to generate any additional, responsive documents using the ‘Beyond’ software
12 besides the collection notes which have already been produced.” *Id.*, at 2. “If my client was to
13 generate the collection notes from the ‘Beyond’ software platform, it would include all of the same
14 information but may not include some of the older collection notes that are otherwise included
15 when generated using the DOS-based platform.” *Id.* “Consequently, you already have everything
16 which my client can produce in this regard.” *Id.* Notably, the documents that Defendant now
17 wishes to use at trial are the very ECA Trace Report and information from Beyond that Defendant
18 claimed did not exist.

19 Plaintiff moved to strike these exhibits in Plaintiffs’ Opposition to Defendant’s Motion for
20 Summary Judgment or Partial Summary Judgment, ECF Doc. No. 151, at 10-12 and Plaintiffs’
21 Reply In Support of Plaintiffs’ Motion for Partial Summary Judgment, ECF Doc. No. 158, at 14-
22 15. Plaintiff moved to strike these exhibits because Defendant claimed in multiple meet and confer
23 discussions that they did not exist at all and then sandbagged Plaintiff with these exhibits two days
24 before the October 25, 2017 discovery cut-off, and *three days after* Plaintiff deposed Defendant’s
25 Rule 30(b)(6) witness. *See id.* Further, even though Defendant now claims these exhibits “prove”
26 that Defendant did not obtain Plaintiff Perez’s phone number through skip tracing, Defendant did
27 not submit or disclose these exhibits in support of its 7/3/2017 Opposition to Plaintiff’s motion for
28

1 class certification, ECF Dkt. 50, Defendant's 8/23/2017 *ex parte* motion for leave to file a surreply
2 in support of its opposition to Plaintiff's motion for class certification, ECF Dkt. 68, or its
3 8/24/2017 surreply, ECF Dkt. 71. At each juncture, Defendant argued that Defendant purportedly
4 did not obtain Plaintiff's number through skip-tracing, and each time Defendant failed to produce
5 or disclose these documents. *See id.* *See also* Order Granting Plaintiffs' Motion for Class
6 Certification, ECF Dkt. 81, at 11 ("If defendant truly had definitive evidence as of May 7, 2015
7 that it did not use skip tracing to obtain Perez's phone number, it defies all logics that defendant
8 would only raise this evidence now, almost two months after filing its opposition."). The Court
9 granted class certification on September 6, 2017, *and still Defendant did not produce or disclose*
10 *the documents* – that is, not until after the Rule 30(b)(6) deposition and two days before fact
11 discovery closed on October 25, 2017.

12 At summary judgment, the Court agreed with Plaintiff that Defendant's sandbagging tactics
13 were not justified and prejudicial and struck the exhibits due to Defendant's blatant discovery
14 abuse:

15 Plaintiffs move to strike Exhibits 18 and 19 to the declaration of Bob Keith
16 which was filed on January 8, 2018. (Dkt. No 140, Declaration of Bob Keith
17 ("Bob Keith Decl."), Exs. 18 and 19.) According to Keith, Exhibit 18 "is a
18 screenshot of an 'ECA Advanced Trace Report'" and "does not show a phone
19 number ending in 5193" which is the number associated with plaintiff Perez
(*Id.* ¶ 12.) Exhibit 19 is a screenshot of a defendant's "'Edit Tracking Report'
for Daniel Reynoso's account." (*Id.* ¶ 13.) Defendant argues that these reports
show that Perez's number was not skip-traced and therefore Perez cannot meet
the class definition.

20 Plaintiffs aver that these exhibits should be stricken pursuant to Fed. R. Civ.
21 Pro. 37(c)(1) because defendant failed to "provide [this] information as required
22 by Rule 26(a)." Specifically, plaintiffs proffer evidence that defendant
23 represented on May 8, 2017, that no "ECA reports were generated for . . .
Perez." (Dkt. No. 151, Ex. 38.) Counsel further represented on May 8, 2017,
that plaintiffs "already have everything which my client can produce in this
regard." (*Id.*)

24 Defendant counters that these reports were generated for Reynoso, not for
25 Perez. Rash Curtis does not persuade. The Court finds defendant's
26 representation that plaintiffs "already [had] everything that [Rash Curtis] can
27 produce" in regard to ECA Advanced Trace and Edit Tracking Reports relevant
28 to Perez's claims inconsistent with defendant's current position that Exhibits 18
and 19 "conclusively establish that Mr. Perez's 5194 number was not skip-
traced." Accordingly, the Court **STRIKES** Exhibits 18 and 19 to the
declaration of Bob Keith.

1 Plaintiffs also move to strike Exhibit 14 which [is] an ECA Advanced Tra[c]e
2 Report for plaintiff Adekoya pursuant to (i) Federal Rule of Evidence 1002, (ii)
3 the best evidence rule, and (iii) defendant's production of these exhibits three
4 days after plaintiffs deposed defendant's 30(b)(6) witness. The Court
5 previously warned defendant that "delaying and sandbagging tactics" would not
6 be tolerated and would result in monetary and/or evidentiary sanctions. (Order
7 Granting Plaintiffs' Motion for Class Certification at 9 n.9.) Accordingly,
8 Exhibit 14 is hereby **STRICKEN**.

9 Dkt. No. 167, at 12 n. 9.

10 Rule 37(c)(1) states that "[i]f a party fails to provide information or identify a witness as
11 required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply
12 evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is
13 harmless." The Court has already held that Defendant violated Rule 37(c)(1) and that Defendant's
14 conduct was not "substantially justified or [was] harmless." *See id.* Accordingly, Defendant is not
15 allowed to use this information "at trial." Rule 37(c)(1).

16 Further, "Local Rule 7-9(b) requires that a party seeking leave to file a motion for
17 reconsideration show reasonable diligence in making the motion and one of the following: (1)
18 [t]hat at the time of the motion for leave, a material difference in fact or law exists from that which
19 was present to the Court before entry of the interlocutory order ... (2) [t]he emergence of new
20 material facts or a change in law ...; or (3) a manifest failure by the Court to consider material facts
21 or dispositive legal arguments which were presented to the Court before such interlocutory order."
22 *Dydzak v. Schwab*, 2017 WL 6001748, at *1 (N.D. Cal. Jan 11, 2017). "Pursuant to Local Rule 7-
23 9(c), no motion for leave to file a motion for reconsideration may repeat any oral or written
24 argument made by the applying party in support of or in opposition to the interlocutory order which
25 the party now seeks to have reconsidered." *Id.* (quotations omitted). "Reconsideration of a prior
26 ruling is an extraordinary remedy, to be used sparingly." *Id.* (quotations omitted).

27 After waiting nearly a year after these exhibits were stricken, Defendant has not even
28 attempted to show diligence in seeking that the Court's prior order be vacated. Defendant has not
presented any new facts or a change in law. Instead, Defendant rehashes all of its old arguments
that the Court found unpersuasive in the first instance. Defendant's motion should be denied.

1 Dated: March 4, 2019

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3 By: /s/ Yeremey Krivoshey
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